

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KONDWANI DARIKIO BEATHEA,

Defendant-Appellant.

UNPUBLISHED

October 16, 2008

No. 278568

Kalamazoo Circuit Court

LC No. 06-002117-FC

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; carrying a concealed weapon (CCW), MCL 750.227; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second offense habitual offender, MCL 769.10, to 81 to 300 months' imprisonment for his armed robbery conviction; to 81 to 300 months' imprisonment for his conspiracy conviction; to 24 to 90 months' imprisonment for his CCW conviction; to 24 to 90 months' imprisonment for his felon in possession of a firearm conviction; and 24 months for each of his felony-firearm convictions.¹ We affirm.

Defendant first argues that the trial court erroneously admitted evidence related to his 2005 CCW conviction. Specifically, defendant contends that testimony showing that he illegally obtained and possessed a gun similar to the gun used in the instant offense amounted to improper propensity evidence and should have been excluded pursuant to MRE 404(b). We agree, but conclude that any error was harmless. We review the trial court's decision to admit or deny evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We review de novo the trial court's admission of evidence to the extent that it involves preliminary questions of law. *Id.* Reversal is not required for a preserved error in the admission of evidence, unless the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

¹ Defendant's sentences for CCW and felony-firearm run concurrent with each other; and his sentences for armed robbery, conspiracy, and felon in possession of a firearm run consecutive to and preceding his sentences for CCW and felony-firearm.

Evidence of a criminal defendant's other acts, crimes, or wrongs is inadmissible to prove a defendant's propensity to commit such acts. MRE 404(b). However, MRE 404(b)(1)² permits the admission of other acts evidence if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). A proper purpose is one that is not offered to show a defendant's propensity. *People v Crawford*, 458 Mich 376, 390 n 8; 582 NW2d 785 (1998).

Here, defendant's prior felony conviction was directly relevant as an element of felon in possession. MCL 750.224f; MRE 401. However, the details surrounding that prior conviction were erroneously admitted as other acts evidence. The entire focus of trial was the identity of the perpetrator and whether it was defendant who actually committed the crimes charged. The prosecution sought to admit the details surrounding defendant's previous CCW conviction because it tended to show that defendant had the ability and opportunity to illegally obtain a handgun and that the handgun that defendant possessed was real. The trial court agreed and admitted the evidence on the basis that it demonstrated defendant's knowledge and opportunity to obtain a firearm. Being that this evidence had no logical relationship to the contested issue at trial—defendant's identity—we are of the view that the evidence that the prosecution sought to admit was nothing more than propensity evidence in disguise, i.e., that defendant had obtained a gun in the past and, in conformity with that past action, defendant had obtained a gun now. In other words, the prosecutor failed to demonstrate that defendant's prior conviction creates an intermediate inference that is probative of the ultimate issue in this case—defendant's identity. See *Crawford*, *supra* at 391. Accordingly, the reasons the prosecution proffered for admitting the character evidence at trial were not valid. Nonetheless, we find that this error was not outcome determinative because overwhelming evidence produced at trial tended to show that defendant committed the crimes charged. See *Knapp*, *supra* at 378. Thus, we decline to grant defendant the relief requested.

Defendant next asserts that defense attorney rendered ineffective assistance of counsel for failing to stipulate to his previous felony conviction for purposes of the felon in possession charge. We disagree. "The determination whether a defendant has been deprived the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Accordingly, we review a trial court's factual findings for clear error and its constitutional rulings de novo. *Id.* In order to prevail on this claim, defendant must show that trial counsel's performance fell below an objective standard of

² MRE 404(b)(1) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

reasonableness and that this deficiency prejudiced the defense. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994) citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Contrary to defendant's assertion, the record reveals that defense counsel expressed his desire to stipulate to defendant's unspecified felony conviction both before and during trial when the court considered whether to admit the details of that conviction as other acts evidence. In fact, the parties stipulated to the felony conviction after the trial court erroneously admitted the details of defendant's previous felony conviction under MRE 404(b). Defense counsel's performance did not fall below the objective standard of reasonableness under prevailing professional norms. See *Pickens*, *supra* at 309. Moreover, defendant has failed to establish, that but for counsel's alleged errors, the outcome of the case would have been different. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Rather, the trial court admitted the other acts evidence regardless of defense counsel's indication that defendant wished for a stipulation and, further, the evidence against defendant was so overwhelming that the outcome of the case would have remained the same despite any alleged error on defense counsel's behalf. Defendant's ineffective assistance of counsel claim fails.

Lastly, defendant argues that his convictions for felon in possession of a firearm and felony-firearm violate the double jeopardy clauses of the United States and Michigan Constitutions as multiple punishments for the same offense. Because this claim is unpreserved, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

We find defendant's claim to be without merit. In *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), our Supreme Court reaffirmed its previous position in *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998), when it construed the language of the felon in possession and felony-firearm statutes and reasoned that it was the "Legislature's intent to provide for an additional punishment whenever a person possessing a firearm committed a felony other than the four [felonies] explicitly enumerated in the felony-firearm statute." *Calloway*, *supra* at 452; see also *Mitchell*, *supra* at 696-698. Because felon in possession is not included in the four exceptions under the felony-firearm statute, the Court held that a defendant could be given cumulative punishments for felony-firearm and felon in possession convictions. *Calloway*, *supra* at 452. Accordingly, defendant has not established plain error. See *Carines*, *supra* at 764.

Despite our Supreme Court's conclusion, defendant argues that *Calloway* and *Mitchell* are no longer binding because the Court's decision in *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007), rendered those decisions unpersuasive. On this basis, defendant argues that when the Legislature enacted the felony-firearm statute, it did not intend for felon in possession to serve as the underlying offense for felony-firearm. We cannot agree. In *Smith*, the Court held that if the Legislature intended to impose multiple punishments then the imposition of multiple sentences is permissible, but if the Legislature's intent is unclear then multiple punishments are permissible only if each offense has an element that the other does not. *Smith*, *supra* at 316. The analysis in *Calloway* and *Mitchell*, although decided before *Smith*, parallels that of the analysis set forth in *Smith*. Accordingly, we do not construe *Smith* as overruling precedent set by *Calloway* and *Mitchell*, *supra*. "The Supreme Court does not favor abandonment of its prior decisions by implication." *Jaschuk v Manistee Co Road Comm'n*, 205 Mich App 322, 325; 517

NW2d 318 (1994). The imposition of multiple punishments in this case does not offend double jeopardy.³

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

³ Defendant also argues that the evidence was insufficient to support one of his felony-firearm convictions because felon in possession cannot be the underlying felony for felony-firearm. Given our conclusion otherwise, we find that defendant's insufficiency of the evidence argument must fail.